IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Criminal Appeal No. 1060 of 2001
(Old No. 1566 of 1981)

1. Karan Singh S/o Indra Singh
R/o Village Kimoli,
Patwari Circle Kankhul,
Tehsil Karanprayag.

2. Km. Nandi alias Yog Maya
D/o Gopi Ballabh Kothiyal,
R/o Village Urgam,
Patwari Circle Helong,
Tehsil Joshimath. …… Appellants

Versus

The State of U.P. ……... Respondent

Mr. R.P. Nautyial, Advocates for appellant No. 1.
Mr. S.S. Adhikari, Amicus Curiae for appellant No. 2.
Mr. D.K. Sharma, Government Advocate for respondent State.

Coram: **Hon'ble Rajeev Gupta, C.J.**
Hon'ble Prafulla C. Pant, J.

Dated: 23.05.2006.

[Per Hon'ble Prafulla C. Pant, J.]

This appeal, preferred under Section 374(2) of the Code of Criminal Procedure, 1973, is directed against the judgment and order dated 23.06.1981, passed in Sessions trial No. 03 of 1980, by the then, learned Sessions Judge, Chamoli, whereby Karan Singh (appellant No. 1) is convicted under Section 302 and under Section 201 of the Indian Penal Code, 1860 (hereinafter referred as I.P.C.) and nandi alias Yog Maya (appellant No. 2) is convicted under Section 302 read with Section 34 of the I.P.C. and each of them is sentenced to imprisonment for life. Appellant

No. 1 is further sentenced to three years rigorous imprisonment under Section 201 of the I.P.C.

2) According to the prosecution story, appellant Karan Singh, in the year 1978-79, was posted was Ward boy in the State Dispensary at Urgam, Patwari Circle –Helong, Tehsil Joshimath. Appellant Nandi alias Yog Maya is a resident of village Urgam. Her father Gopi Ballabh Kothiyal used to serve with Border Road Organization in Sikkim. Her mother Sumitra Devi with whom she used to live was suffering from some aliment and appellant Karan Singh used to come in their house for her treatment. Meanwhile, appellant Karan Singh developed illicit relationship with appellant Nandi alias Yog Maya. Consequently, Nandi alias Yog Maya became pregnant. Chandri Devi (P.W. 5) was working as Midwife in the State Dispensary of Urgam to whom Nandi alias Yog Maya approached for abortion of her child. However, Chandri Devi refused to help in the matter. On this, appellant Karan Singh threatened Chandri Devi (P.W. 5) of dire consequences. Then, Chandri Devi (P.W. 5) gave a report to village Pradhan, Bhawan Singh (P.W. 1) on 21.07.1978. Thereafter, appellant Karan Singh himself gave some medicine to appellant Nandi alias Yog Maya so that the child in her womb may be aborted. She was also given some injection sometime on 5th and 6th of January, 1979. However, a male child who was alive was delivered by appellant Nandi alias Yog Maya, who informed Karan Singh about the delivery. On hearing the same, appellant Karan Singh took a '*DARANTI*' (Sickle) and murdered the child. Later on, he asked Nandi alias Yog Maya not to inform about the incident to anyone.

However, after some days on 13.01.1979, at about 5:00 P.M., the dead body of the child was found in a bundle of grass near the house of Shiv Singh (P.W. 2), who informed about the fact to village Pradhan and kept the dead body in a box so that report may be made to Patwari. On 14.01.1979, at about 11:00 A.M., information (Ext. A-1) was given through Gabar Singh, Peon of the Patwari to Darwani Lal (P.W. 9) Patwari of the village. (In certain areas of Uttaranchal hills, Revenue Officers are given police powers to register and investigate the crimes). P.W. 9, Patwari Darwani Lal took the dead body in his possession and prepared inquest report (Ext. A-2) and got sent the body for postmortem examination.

3) Dr. L.S. Raizada (P.W. 8) performed the postmortem examination on the dead body at the District Headquarter Gopeshwar (Chamoli) on 16.01.1979, at about 1:30 P.M and found following ate mortem injuries:

i) ***Contusion 1½ inch X 1½ inch X bone deep, on top of head and left side of parietal region. On cutting bruising was found present.***

ii) ***Circular incised wound 1½ inch X 1½ inch X bone deep through and through across the neck at the level of second cervical vertebra. Spinal chord, large vessels and nerves muscles all soft parts were found cut. The cut surface of vertebra was stained with blood which could not be washed off. The cut off base of head was fitted on the upper end of neck (vertebral column) and it corresponded with similar injury there on the neck.***

iii) ***Oblique incised wound 5 inch X 2½ inch X cairtaes (chest//abdomen) deep running from the left side of***

neck up to the right hip bone crest. Soft parts and viscera were found exposed.

The Medical Officer on internal examination found that under injury No. 1 the scalp showed haemotoma and bruising 3½ inch X 2 inch. Membranes were congested partly. The brain matter was soft and pulpy and was slightly congested. There was cut fracture of second cervical vertebra (body) through and through. The surface was rough and blood stained. Spinal chord was found cut at the level of second cervical vertebra. Shape of the chest was found mutilated and missing partly on the right side. All the ribs on the right side were found cut at angles. Pleura was found cut corresponding to cut ribs under injury No. 3. Larynx, Trachea and bronchi were found missing with the result that hydrostatic test for lungs could not be performed. Both the lungs were missing. Clotted blood was found present in theracie cavity. Pericardium's were found missing. Both chambers of the heart were found empty. Aiorta vessel was present while the other vessels were found missing. Diaphram was found present reaching up to the 6^{th} and 7^{th} rubs. Right side of lateral abdominal wall was found missing. Peritoneum was found cut on the right side. Cavity had been opened up as a consequence of injury No. 3. Esophagus was found cut at the level of second cervical vertebra and thoracie part was found missing. In respect of the stomach breslaws second life test was positive and negative and it contained about 1 c.c. fluid. The small intestines were empty. Muconeum was filling large intestines. Only left kidney was present, the right one being missing. Bladder was empty. Penis scrota

was well formed according to age and both testis were found present and pulpable in scrotal sac.

In the opinion of the Medical officer the cause of death was haemorrhage and shock resulting from injuries sustained by heavy sharp edged cutting weapon. In the opinion of the Medical Officer the child was capable of separate existence (viable).

4) During investigation the Investigating Officer apart from recording statements of the witnesses got accused Nandi alias Yog Maya medically examined by Dr. K. Pangti (P.W. 7) and also got recovered weapon '*DARANTI*' (Sickle), of which recovery memo (Ext. A- 3) was got prepared. Statements of accused Nandi alias Yog Maya was also recorded under Section 164 of the Code of Criminal Procedure, 1973 (hereinafter referred as the Cr.P.C.) by Sub Divisional magistrate, Jai Veer Singh (P.W.4). The Investigating Officer also got prepared site plan (Ext. A-10). After completing the investigation, the Investigating Officer submitted charge sheet (Ext. A-11) against the appellants Karan Singh and Nandi alias Yog Maya, for their trial for the offence allegedly committed by them punishable under Section 302 and 201 of the I.P.C. The Chief Judicial Magistrate registered the charge sheet and after giving necessary copies to the accused persons, as required under Section 207 of the Cr.P.C., committed the case to the court of Sessions.

5) Learned Sessions Judge on 18.08.1980, after hearing the parties framed charges under three heads against each of the appellant separately, to which both of them pleaded

not guilty and claimed to be tried. However, on 25.11.1980, the charges were reframed again modifying the earlier charges, whereby the successor Sessions Judge framed charge under Section 302 and Section 201 of the I.P.C. against appellant Karan Singh and under Section 302 read with Section 34 of the I.P.C. against appellant Nandi alias Yog Maya. The prosecution, thereafter, got examined P.W. 1, Bhawan Singh (Village Pradhan); P.W. 2, Shiv Singh, (who noticed the dead body of the child lying in a bundle of grass); P.W. 3, Chandra Singh; P.W. 4, Jai Veer Singh Negi, Sub Divisional Magistrate (who, recorded the statement of accused Nandi alias Yog Maya, under Section 164 of the Cr.P.C.); P.W. 5, Chandri Devi (to whom accused Nandi alias Yog Maya allegedly requested for abortion of the child); P.W. 6, Yaduveer Singh (a Pharmacist in the State Dispensary Urgam); P.W. 7, Dr. K. Pangti (who medically examined Nandi alias Yog Maya on 17.01.1979); P.W. 8, Dr. L.S. Raizada (who performed the autopsy on the dead body) and P.W. 9, Darwani Lal, Patwari (who investigated the crime). The prosecution also got proved the documentary evidence, first information report (Ext. A-1); inquest report (Ext. A-2); memo of recovery of *DARANTI* (Sickle) [Ext. A -3]; Statement of Nandi alias Yog Maya, under Section 164 of the Cr.P.C. (Ext. A-4); letter to the Chief Medical Officer requesting for autopsy (Ext. A-5); medical report of accused Nandi alias Yog Maya recorded on 17.01.1979; postmortem report (Ext. A-6); copy of general dairy (Ext. A-9); site plan (ext. A-10); charge sheet (Ext. A-11). The evidence was put to the accused persons under Section 313 of the

Cr.P.C. to which appellant Nandi alias Yog Maya admitted that she had illicit relationship with appellant Karan Singh and she delivered the child. But as to the commission of murder she has not admitted the evidence adduced against her. Appellant karan Singh in his replies has alleged that the evidence adduced against him is not true and further alleged that he has been falsely implicated. In the defence evidence three documents viz. letter to the Chief Medical Officer (Ext. B-1); order of the gram pradhan (Ext. B-2) and copy of general diary (Ext. B –3) were produced. Learned Sessions Judge, after hearing the prosecution and the defence, convicted appellant Karan Singh under Section 302 and 201 of the I.P.C. and sentenced him to imprisonment for life and three years rigorous imprisonment, respectively. Appellant Nandi alias Yog Maya was also convicted by learned Sessions Judge under Section 302 read with Section 34 of the I.P.C. and she was also sentenced to imprisonment for life. Aggrieved by the judgment and order dated 23.06.1981, passed in Sessions Trial No. 03 of 1980, this appeal has been preferred by the convicts.

6) The appeal was originally filed before the Allahabad High Court way back in the year 1981 where the appeal was admitted. This Court received this appeal by transfer under Section 35 of the U.P. Re-organization Act, 2000.

7) We heard learned counsel for the appellants as well as learned Public Prosecutor / Government Advocate and also perused the entire evidence on record.

8) This is not a case of direct evidence but of circumstantial evidence. As such, this Court has to examine whether the prosecution has been successful in proving all the links of the chain of circumstances to establish that the appellant and none else have committed the crime as alleged in the charges framed against them.

9) We first take up the evidence adduced to prove the charge against Nandi alias Yog Maya. The charge against her is under Section 302 read with Section 34 of the I.P.C., which means that she has not actually committed the crime but had alleged common intention in commission of the crime and has participated in commission of crime. Admittedly, as is clear from the statement of the appellant Nandi alias Yog Maya, recorded under Section 164 of the Cr.P.C., by P.W. 4, Jai Veer Sigh, Sub Divisional Magistrate, that she had illicit relationship with co-accused appellant Karan Singh and she conceived a child through him. Also, it is admitted by her that she made efforts to get the child aborted with the help of Chandri Devi (P.W. 5) and took certain medicines administered to her by Karan Singh, but ultimately, she delivered the child in the seventh month of pregnancy. She has admitted this fact even in her examination under Section 313 of the Cr.P.C., when the prosecution evidence was put to her. Factum as to the delivery of child by this unmarried young lady is also corroborated from the statement of P.W. 7, Dr. K. Pangti, who examined her medically on 17.01.1979 and prepared report (peper No. 3-A/5) on the record. However, this Court is conscious of the fact that neither mere keeping of illicit relationship with Karan Singh on the part of the

unmarried lady nor delivering the child by itself is any offence under any penal law. What this Court has to examine is whether she had a prior meeting of mind with Karan Singh in alleged commission of murder of the child born of the illicit relationship. In other words, the above admission by appellant Nandi alias Yog Maya are of no help to the prosecution as far as the commission of murder allegedly committed by appellant Karan Singh is concerned, particularly, with regard to the common intention on her part with him. True, common intention relates to the state of mind and there cannot be direct evidence of that fact, and it has to be gathered from the circumstances of the case. From the evidence on record only this much can be said that till the child was delivered she was with appellant Karan Singh in getting terminated the pregnancy, as naturally, she would not have liked that she be known in the Society to be mother of a child when she had not married to anyone. But, we cannot close our eyes to the fact that the prosecution has nowhere established that either she asked appellant Karan Singh to commit murder of the child she delivered or she had consented for killing of the child. Nor was she present at the spot where according to the prosecution appellant Karan Singh committed murder of the child delivered by Nandi alias Yog Maya. Had she been present with Karan Singh at the time of alleged commission of crime, this Court would have accepted the prosecution story that she had common intention in commission of murder of her child. But it is not so on the record.

10) Now, we have to examine whether the prosecution has been successful in proving the charges framed against appellant Karan Singh that he committed alleged murder of the child delivered by co-accused Nandi alias Yog Maya and concealed the dead body of said child. Again, it is pertinent to mention there that is no direct evidence of alleged commission of crime in this case. Of course, it is a significant fact that the statement of Nandi alias Yog Maya (co-accused) recorded under Section 164 of the Cr.P.C. and her replies given to the court under Section 313 of the Cr.P.C. do indicate that appellant Karan Singh had illicit relations with Nandi alias Yog Maya and she conceived a child through him which was delivered by her. It is also proved on the record that a child was found dead after few days of the delivery. But this Court cannot ignore the settled principle of law that on the basis of the statement of the co-accused another co-accused cannot be convicted of the charge framed against him. What is missed by prosecution in this case is this that instead of getting made to prosecute her as co-accused, and as such, the prosecution cannot take now benefit of what the co-accused has said against another co-accused. We have to kept it in mind that appellant Karan Singh had no occasion to cross-examine Nandi alias Yog Maya. Before the trial court as well as before this Court, both the appellants have engaged their own separate counsel. Not only this, appellant Karan Singh on his part nowhere admitted that he had illicit relations with Nandi alias Yog Maya. Rather, he has denied the same. It is suggested on behalf of the appellant

Karan Singh to the prosecution witnesses in their cross examinations that Nandi alias Yog Maya had illicit relations with P.W. 6, Yaduveer Singh, who was a Pharmacist in the same Dispensary where the appellant Karan Singh was posted as Ward boy. In these circumstances, from what has been stated by co-accused Nandi alias Yog Maya, her statement cannot be read to convict appellant Karan Singh.

11) P.W. 1, Bhawan Singh, Village Pradhan, is not witness of fact of commission of crime, but he simply says that on 13.01.1979, at about 5:00 P.M., P.w. 2, Shiv Singh informed him that he has seen a dead body of a child in the bundle of grass. His evidence does not connect appellant Karan Singh with the crime. P.W. 2, Shiv Singh who saw the dead body of child on 13.01.1979 and brought it from there and informed the Pradhan, P.W. 1, Bhawan Singh had stated that Karan Singh had illicit relations with Nandi alias Yog Maya, but his statement do not throw any light as to the fact whose child was it the body of whom was found by him. P.W. 3, Chandra Singh has given a statement that he saw Karan Singh giving an injection to Nandi alias Yog Maya when she was pregnant. But, this also does not throw light on the fact that who killed the child and whose child was the one who was found killed, lying in the bundle of grass. It is only P.W. 5, Chandri Devi, a Midwife, who says that when Nandi alias Yog Maya was pregnant she came to her for getting the child aborted. This witness further states that she saw Karan Singh near the bundle of grass in the filed of Shiv Singh (P.W. 2) on 13.01.1979. This part of the statement of the witness is hard to believe

that after several days of commission of murder, appellant Karan Singh would come to the spot when the other witnesses have already noticed the dead body of the child. Condition of dead body as mentioned in the postmortem report (Ext. A-6) does not rule out that the dead body of the child might have been brought by some animal near the field as several parts of the dead body were found missing. It can also be not ruled out if some animal had eaten various parts of the dead body at that place where the dead body of the child was lying. From the chain of circumstances it cannot be inferred that only the appellants have committed the offence charged against them and by none else.

12) For the reasons as discussed above, we are of the view that in the above circumstances, it cannot be said if the charge has been proved against either of the appellant beyond reasonable doubt. As such, the appellants are entitled to the benefit of doubt, in the facts and circumstances of the case. Giving them benefit of reasonable doubt, we feel that the appeal deserves to be allowed. Accordingly, the appeal is allowed. The impugned judgment and order convicting the sentencing the appellants, passed by the trial court is hereby set aside. The appellants namely, Karan Singh and Nandi alias Yog Maya are acquitted of the charges framed against them.

(Prafulla C. Pant, J.) **(Rajeev Gupta, C.J.)**

Dt. May 23, 2006.
H. Negi